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Question B- To what extent do current exclusions and limitations to copyright strike a fair balance between the rights of owners and fair use by private individuals and others?

International Report

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1. Introduction

This International Report examines the increasingly complex balance between the interests of the copyright owners, on one hand, and the interests of the users of their work, on the other hand. In particular, it considers how the current laws and the court decisions of those countries that have prepared National Reports strike that balance. On this occasion, it reflects the critical comments which have been expressed by the national rapporteurs vis-à-vis the current system, it tries to identify the issues where there is room for a progress and it seeks to open up new avenues to manage diverging interests.[1]

2. Background

2.1 The key challenges related to the question

In the field of intellectual property, copyright is probably one of the area's which should call for the closest attention to the exceptions and limitations to the owners' rights. A number of reasons might justify such an attention.

Amongst those reasons, on the one hand, there is the fact that the scope of copyright is extremely broad, both in terms of eligible subject matters and in terms of exclusivity in favour of the owner. Moreover, on the other hand, there is the fact that a constantly increasing number of activities imply the use of protected works, while those who conduct these activities might invoke legitimate rights and interests which deserve respect too.

Especially in the digital environment (even if the non-digital environment is also concerned), permitted use of copyright protected works is more and more considered as a must-have, as a consequence of the development of new techniques or new business models (such as format shifting, distance learning, mobile applications for cultural institutions, big data).

Admittedly, in light hereof, it is tempting to say that copyright laws should permit more uses without the copyright owner's consent. However great care is required, because the situations may vary significantly and the respective interests of the owner and the user do not always deserve the same level of respect.

Indeed, the activities and the interests of the users of copyright works may be very different. They range from the non-commercial use by private individuals (e.g. private copy) to the commercial use by profit-making entities. The nature of the activities, the objectives pursued, and the fact that the activity is conducted by a private individual, or by a non-profit entity rather than by a profit-making entity can be decisive when considering the respective interests of the copyright owner and those of the user of the work.

To give an example, when it comes to digitization, i.e. converting a work into data which can be read by a computer and transferred to other computers, the situations will vary depending on whether the digitization is made by a private individual for his personal use, by a cultural non-profit entity officially organized by the

[1] The author is very grateful for the national reports which have been submitted from the following jurisdictions: *Austria* (Valerie Eder); *Belgium* (Manon Knockaert); *Brazil* (Felipe Barros Oquendo) ; *Czech Republic* (Radka MacGregor Pelikanova); *France (*Martina Isola and Guillaume Couet); *Germany* (Thomas Hoeren); *Hungary* (Zsofia Lendvai); *Italy* (Marco Francetti); *Poland* (Maria Obara-Piszewska, Filina Sztandere) ; *Romania* (Paul-George Buta); *Switzerland (*Sevan Antreasyan) ; *UK* (Eleonora Rosati).

authorities for archiving purposes, or by a profit-making organization acting on a large scale for commercial purposes.

In this context, it is reasonable to state that the copyright protection system needs to consider solutions which strike a true balance between the legitimate interests of all parties involved, namely the copyright owners on the one hand, and the users of copyright works on the other hand. Exceptions and limitations to copyright play a key role to this end. Indeed, they are supposed to ensure the balance required. The way the exceptions and limitations are worded and the fact that they generate or do not generate a compensation in favour of the copyright owner are key when assessing if they are appropriate.

However a growing number of questions arise as to whether the exceptions and limitations that are currently provided by the various legal instruments are sufficient to tackle this huge challenge. Are they readily understandable? Are they appropriate to the current and the future needs? Are they flexible enough? Are they proportionate? Is there any risk that they might constitute barriers to legitimate trade? Do they imply financial compensation which could negatively impact the balance? Do we need new exceptions? Must the list of exceptions and limitations be an open-ended list rather than a closed list, a non-exhaustive rather than an exhaustive one? Must the exceptions and limitations be mandatory, and is so, all of them? Should the law provide for a broad and flexible concept like "fair use" or any other comparable concept rather than for a list of rigid and well-detailed exceptions and limitations?

2.2 Legal Background

The international agreements to be taken into consideration when dealing with the question include *inter alia* the following main instruments:

- Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, lastly amended on September 28, 1979[2]
- Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), adopted in Marrakesh on April 15, 1994[3][4]
- WIPO Copyright Treaty, adopted in Geneva on December 20, 1996[5]

Even though they are not truly indispensable to discuss the question, the following instruments may also be mentioned: The Beijing Treaty on Audiovisual Performances which was adopted on June 24, 2012; the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled adopted on June 27, 2013.

Moreover, as far as the European Union is concerned, attention has to be paid to the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society[6]. Also to be mentioned: the proposal of Directive of 14 September 2016 in the framework of the copyright reform package, in particular concerning the exceptions related to research, education, libraries and big data.

[2] http://www.wipo.int/treaties/en/text.jsp?file_id=283698#P140_25350

[3] Available under: https://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm.

[4] https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm

[5] http://www.wipo.int/treaties/en/text.jsp?file_id=295166

[6] http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32001L0029&from=FR

2.3 Preliminary remarks about the wording of the question

The question, as adopted by the Executive Committee of ILCL, reads as follows:

"To what extent do current exclusions and limitations to copyright strike a fair balance between the rights of owners and fair use by private individuals and others?"

The wording above might raise some question marks. Therefore, it seems appropriate to give clarifications and, where necessary, to suggest alternative wordings.

In particular, the following terms or expressions deserve explanations:

1) "exclusions" [to copyright]: this term may be read as a synonymous of "exceptions" [to copyright];
2) "Fair use" [by private individuals]: this expression has a broad meaning so that it cannot be limited to the specific meaning which it has in a legal system like the United States; "fair" refers to a use which is made in accordance with the legitimate interests and rights of the user, and proportionate to these interests and rights;
3) "by (…) and others": this expression refers to other persons than "private individuals", *inter alia*, individuals acting for profit, non-profit organizations, public entities, profit making organizations (including business entities).

2.4 Preliminary remarks about the scope of the question

The scope of the question is deliberately large. Actually, it seeks to cover any kind of restriction on copyright which results into a permitted use of the work without the consent of the copyright owner. The question uses the term "exclusions" which is probably less usual in this context. This term may be understood as a synonymous of "exceptions" even if, admittedly, it also refers to situations where the legislature has "excluded" some content (such as political speeches or news of the day) from the benefit of copyright protection. The questionnaire here below mostly uses the term "exceptions" rather than "exclusions". Moreover, the term "exceptions" as used here below is supposed to cover "limitations" as well.

Furthermore, the question does not distinguish between the various mechanisms implementing the restrictions on copyright, such as "pure" exceptions (i.e. exceptions without any compensation for the copyright owner), exceptions with a compensation for the copyright owner, or compulsory licenses.

3. Discussion of the various issues related to the question

3.1 Role and importance of the three-step test

Before getting into a detailed examination of the various exceptions and limitations to copyright, it seems critical to emphasize the role and the importance of the so-called three-step test in this context.

According to the terms of this test, as provided in the TRIPS Agreement and the WIPO Copyright Treaty, States shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder[7]. To some extent, this test is provided in the Berne Convention as well[8]. The EU legislation contains a similar provision[9].

As a consequence of this rule, States appear limited in their freedom to foresee exceptions and limitations. In particular, they need to make sure that the exceptions and limitations shall not be contrary to a normal exploitation of the work or cause an unreasonable harm to the legitimate interests of the copyright owner. And, first of all, they may adopt exceptions and limitations only in special cases. In other words, the three-step test is a guarantee in favour of the copyright owner that his interests shall be safeguarded, at least to a certain extent.

In contrast, this rule does not *directly* provide for any specific and explicit guarantee for the benefit of the user of the work. Implicitly, the mere fact that a State foresees an exception or a limitation is deemed a sufficient way to meet the user's needs. There is no further indication in this rule about the fact that the exception should preserve the user's interests and ensure a proper balance between his interest and the interest of the copyright owner.

Having said that, it remains unclear how far this guarantee for the copyright owner is reaching. In particular, it is disputed whether it is a rule for the State legislature only, or also for the State judicial authorities. In the second option, the courts would be to verify whether the exceptions and limitations comply with the test in concrete cases, while they would not in the first option. This is to say that the official position of each State in this respect is important to assess the effectiveness and the level of requirement of the three-step test.

The results that appear from the national reports on this subject can be summarized as follows.

In the majority of the **EU Member States** – with some exceptions which include **UK** - the three-step test has been implemented into national legislation, due to the fact that the test is explicitly mentioned in the Directive 2001/29.

Moreover, it seems that in most of the **EU Member States** – this time even in **UK**- the three-step test serves as a general guidance for the national courts when they apply national exceptions and limitations in specific cases. In this regard, the **Austrian** rapporteur emphasizes that even when the three-step test is not implemented into national law (as is the case in Austria), the national exceptions and limitations must be interpreted in conformity with the three-step test as adopted in the Directive 2001/29. As the **Czech** report says, the three-step test constitutes a universal interpretation rule for all free uses and compulsory licenses. Admittedly, in many situations, the literal wording of the exceptions themselves already includes a language which aims at reducing the potential impact on the exploitation of the work and the legitimate interests of the copyright owner. But beyond this internal reduction, the three-step test may be viewed as an additional external tool to ensure that the exception or limitation at stake effectively stays within boundaries that are acceptable from the right owners' perspective.

It is worth referring to certain specific parts of the national reports in this respect. E.g., in **France**, it appears that the courts may rely on the conditions of the (external) three-step test in order to deny the user the benefit of an exception even when the specific (internal) conditions for the exception are met. In **Italy** as well, it seems admitted that the three-step test constitutes a general interpretative standard for the judges. The same applies in **Belgium**. Even though the three-step test was not implemented into national law in this country, the explanatory memorandum provides that courts can use the test as a guideline.

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[7] Article 13 of the TRIPS Agreement, see above; Article 10 of the WIPO Copyright Treaty, see above.

[8] See in particular article 9 with respect to the right of reproduction.

[9] Article 5, §5, of the Directive 2001/29/EC reads as follows: « The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder».

At the same time, it seems that in many countries the number of cases where the judges rely on the three-step test remains rather modest. In **Italy**, for instance, the national rapporteur mentions that the judicial practical application of the test is not particularly widespread outside the scope of private copying disputes. In **Hungary** as well, it seems that the courts focus on the specific conditions required for the exception at stake rather than they analyze the merits and the application of the three-step test. In **UK**, the rapporteur explains that lack of a specific provision outlining the three-step test in the national law, together with the idea that the three-step test would be akin to the UK concept of 'fair dealing', is the principal reason as to why "[th]ere has been very little judicial consideration" of the three-step test in UK case law. That being said, in some countries, the reference to the three-step test is effective. In **Romania** e.g., the courts tended to verify the meeting of the special conditions first and, where satisfied, verify whether the general conditions are also cumulatively met.

Actually different factors may explain why only few decisions refer to the three-step test. This may have to do with the fact that the national law is considered implementing the test (e.g. in **UK** the notion of "fair dealing" is deemed equivalent to the three steps), or with the fact that in many cases the internal test is unsuccessful so that there is no need to assess the compliance with the three-step test (see, e.g., the report for **Poland**).

Furthermore, when the court decisions rely on the three-step test – which does not occur frequently – in most cases they generally conclude that the application of the exception is not contrary to the test. In **Germany** e.g., the national rapporteur notes that the number of cases in which courts denied to apply an exception on the account of the triple test is very low.

In non-EU countries, where the support for the three-step test is to be found only in the international instruments (Berne Convention, TRIPS, WIPO-treaties), the trend is very clear in the same sense. In the report for **Brazil**, the decisions referred to, in particular those handed down by the Superior Court of Justice, generally find that the exceptions at stake do comply with the three-step test. In **Switzerland**, the rapporteur has no national decision to mention where the court would have rejected the application of a national exception for the reason that it is contrary to a normal exploitation of the work or it unreasonably prejudices the legitimate interests of the copyright owner.

The reason why the exception is found to be contrary to the three-step test only in a few cases might have to do with the interpretation of the terms of the test. In **Germany** for instance, the Federal Court of Justice decided that the normal exploitation is only endangered when the allegedly infringing use is in direct competition with the normal exploitation. E.g., a textbook that was not only created for university use, is not in direct competition with a document using parts of the textbook for university use.

In this regard, the **Belgian** national rapporteur suggests that the compliance with the three-step test is likely to be assessed in two different ways, namely an abstract way and a concrete way, whereby the latter is preferred in Belgium.

In the abstract way, the judge simply verifies whether the legal basis for the exception or limitation is designed in such a manner that it meets the general conditions of the three-step test.

In contrast, in the concrete way, the judge goes beyond the mere analysis of the legal provision. He seeks to find whether in the specific situation referred to him the application of the legal provision reveals inconsistencies with the three-step test.

The concrete approach, while it is deemed appropriate in many countries, is a source of repeating discussions. In particular, questions arise as to what has to be considered a "normal" exploitation of the work and what has to be understood an "unreasonable" prejudice to the legitimate interests of the copyright owner.

The *Tixdaq* case in the **UK** gives an illustration of these discussions. *Tixdaq* was a case concerning the unauthorised reproduction and making available of short extracts of television broadcasts of cricket matches. The court denied the defendant to benefit from the exception for the purpose of reporting current events because the application of this exception would violate the three-step test. In particular, the court noted that 'conflict with a normal exploitation of the work or other subject-matter' refers to exploitation of the work by the copyright owner, whether directly or through licensees, while attention must be paid not only to current exploitations but also potential

exploitations in the future. Considering the third step (that the exception at hand must not 'unreasonably prejudice the legitimate interests of the rightholder'), the court found that a balance to be struck between the copyright owners' legitimate interests and the countervailing interests served by the exception".

The **German** report mentions a recent case about the exception which allows making works available to the public for purposes of instruction and research. In that case, a distance university made available 91 of 476 pages of a textbook for psychology-students. One of the questions was whether the university's use of the work conflicted with the normal exploitation of the work, as there was no need for the students to purchase the book. The German Federal Court of Justice pointed out that the triple test is decisive for the application of exceptions to copyright. The federal judges decided that the normal exploitation is only endangered when the usage is in direct competition with it. As the textbook was not only created for university use, this was not the case.

It could be said that the more detailed the analysis of each individual step of the three-step test, the more chances that a real balance can be found between the interests of the copyright owner and the interests of the users.

In contrast, some national reports tend to indicate that their national courts can be less detailed when they apply the three-step test. E.g., the report for **Czechia** mentions a decision of the **Czech** Supreme Court who used one part of the three-step test (namely the prejudice to the legitimate interests of the copyright owner) in a general way. In the case concerned, the Court rejected the free use defence in a situation where the work was made available between members of one and the same association. The Court found that no license was obtained to permit using the copyrighted work by others than the purchaser of the work and that an opposite interpretation would lead to an unjustified breach of the legitimate interests of authors.

All that being said, before getting into a close look to each individual step of the three-step test, the very first exercise for the judge, is to assess whether the use under criticism falls within the scope of the national exception or limitation. The reports for **France** and **Poland** put the stress on this priority.

3.2 Closed vs Open-ended list of exceptions and limitations

Generally speaking, the list of exceptions and limitations to copyright is an exhaustive list in all the countries covered by the national reports.

As a result of the harmonisation through the Directive 2001/29, in all the EU Member States the system of exceptions and limitations is a closed one (see below). But the solution is not different in the non-EU countries that submitted a report (**Brazil** and **Switzerland**).

The **Swiss** rapporteur mentions in this regard that although not explicitly stated in the national law, the exceptions set forth in that law are exhaustive. As a consequence, any use which falls outside the list shall in principle not be permitted without authorization from the copyright owner. Moreover, according to the Swiss Supreme Federal Court the fundamental rights other than copyright shall not serve as a basis to extend or create a new exception to copyright, even though they should be taken into consideration when interpreting a copyright exception.

In **Brazil** too, the number of exceptions is a closed number. That being said, the Brazilian rapporteur stresses that some exceptions have been written in such a way that they do not seek to define a specific situation, but embrace several hypotheses. This applies e.g. to the exception permitting the reproduction, in any works, of small stretches of pre-existing works, of any nature, or of integral works, in the case of plastic arts, when reproduction itself is not the main objective of the new work and does not prejudice the exploitation, reproduction nor cause unjustified prejudice to the legitimate interests of the authors.

In **Romania** as well, the list of exceptions provided by law is a closed one, meaning that, in order for any exception to apply, the use must fall within the ones on the list, any other use being subject to the authorisation of the author and/or right holder.

Although the list of exceptions is clearly exhaustive in all the EU countries, a number of nuances and clarifications deserve to be mentioned.

First, it has been observed by several rapporteurs that the national numbers of exceptions have increased constantly, and more and more rapidly over the last period.

Second, it may happen that some uses are permitted by the courts even though they not authorized by the copyright owner nor specifically covered by an explicit exception or limitation. The **French** rapporteur refers in this respect to court decisions which have found that the uses at stake constituted non infringing "accessory reproductions" or "accidental inclusions", i.e. uses which do not fall within the scope of the exclusive rights; said uses concern for instance cases where the work is not reproduced for itself but only in an accessory manner to the main subject (e.g., reproduction of a work in a documentary).

In the same direction, the **Austrian** report too emphasizes that uses not falling within the scope of the exclusive rights can be viewed as limitations to the copyright – in a broad sense. Such uses include, according to the Austrian rapporteur, the mere consumption of the work, but also –probably subject to some conditions - the exhibition a published work.

Third, as commented by the **Austrian** rapporteur, national copyright law can provide for exceptions beyond the closed list if covered by the so-called grandfather clause, i.e. exceptions that were already provided by national law before the implementation of the Directive 2001/29/EC and relate to non-digital uses.

Four, according to the **Austrian** rapporteur, limitations to copyright also arise from other areas like the principle of exhaustion, other rules and regulations outside of the Copyright Act (including, e.g. antitrust law), and enforcement of other fundamental rights. In contrast, the report for **Poland** mentions that there is no purpose in trying to devise any new forms of permissible use on the basis of any laws or regulations other than the Copyright Act. Likewise, according to the **French** rapporteur, since only the exhaustive list of exception allows uses without the consent of the author, there is no general situation in which other fundamental rights permit the use without consent of the author (i.e. a "general" situation outside copyright law itself). This is to say that the exceptions themselves are already thought and provided in order to balance fundamental rights other than copyright such as freedom of expression, right to private life, right to education, and the right of the copyright owner. The formulation of those exceptions is already the result of this balance. The use must therefore comply with the conditions required for the application of the relevant exception. However, it always remains possible for the judge to see an "abuse" of copyright, because the copyright, even in its prerogatives under the moral right, is not discretionary. Similarly, the copyright cannot confer any immunity in light of the violations of the rights of third parties, whether focused on personality rights, or simply the right of property. However, the reasoning might be different for rights that were not taken into account in the balance of the exceptions, such as competition or consumer law. Hence, those considerations, can eventually, in certain circumstances, limit the exercise of the copyright owner.

Five (see the **Austrian** report in this regard), in a still broader sense, copyright exceptions or limitations could be considered addressing subject matters that are excluded from copyright protection, like law and decrees.

3.3 Missing exceptions?

Since the list is a closed one in all the countries covered by the national reports, the question arises as to whether it disregards some users' fundamental rights that could justify exceptions or limitations that are not included.

To address this question properly, it seems necessary first to identify the different users' interests that have been taken into account in the current various legislations, as well as the extent to which they have been taken into consideration.

The national laws generally address all of the following users' fundamental rights and offer corresponding useful exceptions in this regard: education, research, access to culture and knowledge, freedom of expression and right to receive and disseminate information, privacy and private use, needs of people with a disability, preservation of cultural heritage, public security, freedom of panorama.

No national reporter seems to suggest that his national list would be missing exceptions in relation to specific users' rights. On the contrary, the **Czech** report indicates that according to the general Czech opinion, the national list does not appear to overlook or unduly minimize any users' fundamental right.

3.4 Restrictive interpretation vs flexible interpretation

National rapporteurs often emphasize that the exceptions and limitations are generally subject to a strict interpretation. However, this does not necessarily exclude some nuances and even some reservations. Actually, there might be some differences between the national traditions in this respect.

The **Italian** rapporteur is particularly explicit about the principle of restrictive interpretation. He emphasizes that due to their nature of special rules, the provisions relating to exceptions and limitations cannot give rise to analogous and extensive interpretations and must only be applied to cases expressly provided for. These rules, given that they are of an exceptional nature and, in particular, derogations from the general principle which reserve the right to use the work of the author, should be taken to be strictly interpretive and must therefore be excluded from the possibility of giving the words a meaning other than the literal meaning. Likewise, the **Polish** rapporteur indicates that as permissible use provisions impose limitations on the author's monopoly, they must always be interpreted strictly and any doubts must be resolved in favour of the right holder. In **Romania** too, the courts have indicated that the exceptions and limitations must be narrowly interpreted and applied restrictively due, first and foremost, to their qualifications as exceptional situations carved out of the scope of the generally applicable copyright protection. The **Hungarian** rapporteur notes that there is very little room to no flexibility for the court, and he even refers to a rigidity of the rules. In contrast, the **Austrian** rapporteur seems to take the view that there is no reason to exclude the analogous application of the provisions concerning the exceptions. Moreover, there is apparently a tradition of higher flexibility in favour of parodies.

According to the **Swiss** rapporteur, as a matter of principle under Swiss law, exceptions provided in an act shall be interpreted restrictively. In addition, according to a general principle of interpretation under Swiss copyright law, in case of doubt, a statute shall be interpreted in favour of the author/copyright owner (in dubio pro auctore). But at the same time, there is a common tendency not to apply those general principles in a too schematic way.

The **Belgian** rapporteur notes that on the one hand the exceptions receive a strict interpretation while, at the other hand, according to the jurisprudence of the Court of Justice, the effectiveness of the exceptions must be preserved, provided that the three-step test is satisfied.

Restrictive interpretation does not mean that there is no room for any flexibility. The **Swiss** rapporteur notes in this regard that some exceptions provide more flexibility than others which are more specific. In the same direction, the **Brazilian** rapporteur finds that there is some flexibility and scope for a wider interpretation of some exceptions. At a minimum, paragraph VIII of Article 46, by providing conditions for a use to be an exception rather than describing a specific hypothesis, already gives an opening to the adaptation of the rules for new situations.

Most national rapporteurs find that depending on their nature and/ or purpose, certain exceptions or limitations may be or may not be subject to narrow conditions in terms of beneficiaries and commercial or non-commercial uses.

The following examples are illustrative in this respect:

- Requirement that the use must be *non-commercial* for the archival and back-up exceptions in favour of the museums (**Swiss** Report), for the private copy of extracts (**Brazilian** Report), for the private representation within the family circle (**French** Report), for the freedom of panorama (**Romanian** Report) while such a requirement is *not applicable* to freedom of expression, parody or quotation (**Brazilian** Report);
- Requirement that the use must be reserved *for individuals* for the private copy sensu stricto (**Swiss** Report) while such a requirement is not applicable to the exception of the demonstration of the product for sale, or the freedom to reproduce excerpts from newspapers (**Brazilian** Report).
- Requirement that the works concerned must correspond to a very precise category of works for orphan works or commercially unavailable works (**Polish** Report).

The **UK** rapporteur mentions that generally speaking some UK copyright exceptions are limited to certain beneficiaries and/or subject-matter, while other exceptions are subject to a number of conditions and are limited to certain specified purposes (at times restrictively interpreted by courts, e.g. in the case of criticism or review).

3.5 Obligatory vs optional; unwaivable vs waivable

Obviously there could be some ambiguity around the discussion concerning the mandatory character of the exceptions, in particular those listed in the Directive 2001/29/EC. Actually it raises two questions. The first question is whether States are obliged to implement all the exceptions listed therein into their national law. The second question, more delicate, is whether contractual override of exceptions that are adopted by national law is admissible or not.

The national reports concentrated on the second question (see below).

Before getting into the comments about that second question, it is worth addressing the first one. A brief comment may suffice to this end. With respect to the exceptions listed in the Directive 2001/29, it is unanimously admitted that they all – but one - are optional in that the States are free to implement them or not. There is just one exception that is mandatory, namely the exception with respect to the temporary copies. This specific exception must be adopted by the EU Member States. All the other exceptions may be or may not be adopted by them, at their entire discretion.

The second question, as to whether the exceptions may be overridden by contract is more delicate. Clearly, the countries concerned have opposing views in this regard.

First a number of countries are in favour of the unwaivable character of the exceptions.

Within EU, the **Belgian** rapporteur notes that under his national law, as a consequence of an express provision, all the exceptions are mandatory. Consequently, there is no possibility of derogation by contract. The imperative nature of the exceptions provides an answer to a major concern. Indeed, the Directive 2001/29/EC encourages the use of contracts in the information society. The fear was therefore that copyright owners would abuse this possibility to prohibit, by contract, uses that are permitted by the law. The Belgian legislator wished to avoid such practices. Likewise, the **Hungarian** rapporteur indicates that as the provisions of the Copyright Act are typically mandatory the exceptions have to be regarded mandatory as well, unless otherwise specified. Also in the **UK**, the initial position of the government appeared to be in favour of a broad prohibition of contractual override of exceptions. But in the end, this prohibition seems to be less broad.

In non-EU States, there are positions going in the same direction. The **Swiss** rapporteur takes the view that, although there is a debate on this subject, all the exceptions under his national law shall be considered – in principle – to be mandatory and, therefore, that they cannot be ruled out by contract. The **Romanian** rapporteur notes that all the exceptions provided in his law are mandatory and can't be ruled out by contract. He considers that this position has been confirmed by the jurisprudence.

At the other end of the spectrum we may find the States that are in favour of the contractual override of the exceptions, to a greater or lesser extent.

The **Italian** rapporteur notes that generally speaking, contractual waiver can apply to exceptions. However, contractual override is excluded in certain cases where the nature of the exceptions is mandatory. The latter cases concern, for example, the freedom of parody, the quotation for criticism and discussion or use in the exercise of the right of chronicle, or uses for public security purposes or during a judicial, administrative or parliamentary proceedings. The **French** report mentions that, under French law, a contract can modulate the scope of the statutory exceptions or even paralyze them. In the same direction, the **Polish** rapporteur notes that the unwaivable character of permissible uses is not clearly stated in the law. However, it has been firmly established that the exceptions generally are not mandatory rules so that permissible use may be modified by contract. This is said to be justified by the need to respect one of the fundamental principles of civil law, i.e. freedom of contract, and by the fact that the law does not clearly prohibit the option of permissible use provisions being contractually limited or ruled out.

Between the two opposing tendencies which are respectively in favour and in disfavour of contractual override of the exceptions, there are the countries where the solutions are more confused. E.g. the situation under **German** law is unclear. The German rapporteur notes that some exceptions are expressly declared mandatory which does not necessarily mean that other exceptions are not. Moreover attention has to be paid to civil law rules which are applicable to this subject. As a consequence hereof, it seems that the question as whether specific exceptions are waivable must be solved on a case-by-case basis. According to the **Austrian** report, free uses can theoretically – in the absence of an express provision stating otherwise – be ruled out by contract, provided this is possible according to general civil law, which is however only rarely the case.

3.6 The nature of the rights derogated: reproduction and communication distinguished or not

In some countries, situations can occur where according to the terms of the law reproduction is permitted while communication to the public is not. Such a failure could create a serious inconvenience in practice. Therefore the question arises as to whether the national law makes a distinction between the kinds of use in terms of exceptions, and whether case law provide for solutions in case of failures.

Many countries put that the question whether the law allows either a free reproduction or a free communication of the public, or both, may vary upon the use contemplated by the exception. Some exempted uses speak for themselves. For instance, private use will lead to a free reproduction only since no communication to the public is involved.

Some countries do not appear very specific in this respect. E.g., the **Brazilian** rapporteur mentions that his law makes no distinction between reproduction and communication to the public, except in certain situations. Likewise, the **Hungarian** rapporteur notes that the free use exceptions are not defined along the lines of certain economic rights. Certain uses by certain persons in certain cases are allowed. The provisions on the exceptions do not make any distinction according to reproduction right or right of communication to the public. Other rapporteurs, like the **Austrian** rapporteur, emphasize that the national law can be extremely detailed concerning the nature of the rights which are derogated.

However, there are indeed situations where both rights are concerned, namely reproduction *and* communication to the public, while only one of them is specifically addressed by the legal exception. This is e.g. the case, notes the **French** rapporteur, for quotation. This exception justifies a free communication to the public, even though the law only mentions a free reproduction. In such a situation, case law tends apparently to admit that even the right that is not specifically addressed by the legal terms may be derogated.

The **Polish** rapporteur mentions in this regard that a lot will depend on the purpose of the exception. For instance, the purpose of private use is to satisfy personal needs, i.e. not only a private reproduction but also the lending of a work to a friend. He distinguishes this situation from the situation where digital files are exchanged through peer-to-peer networks. This last situation involves complete strangers, and thus a communication to the public. In the same direction, the **Romanian** rapporteur also notes that the purpose of the exception has to be taken into consideration. E.g. the exempted making of a derivative of a work implies the use of the derivative thus made, failing which, the exception would miss its objective.

3.7 The interaction between exceptions and moral rights

Some national reports (i.a. **France**, **Italy, Austria, Belgium**) first emphasize that the exceptions derogate economic rights only, thus not moral rights. The **Polish** report observes in this regard that even when the preservation of a specific moral right is not mentioned in the law, in particular the right of integrity, it must be respected.

That being said, the vast majority of the national rapporteurs, including the foregoing, expressly note that *de facto* the exceptions have an impact on moral rights. For instance, parody has an impact on the moral right of integrity, as emphasized by a number of national reports (**Switzerland, UK**). The **Swiss** rapporteur takes the view in this respect that the moral right cannot be opposed as such to the beneficiary of the exception of parody, failing which, the exception would lose its raison d'être. The **Brazilian** rapporteur notes for his part that his law puts some limits in that the parodist may not cause discredit to the author.

Reciprocally, moral rights have forced legislators to provide for some kind of safeguards in their favour when regulating the exceptions. E.g., the moral right of paternity is taken into consideration in the context of the exception of quotation, where the law requires that the source must be mentioned, as noted in certain national reports (**Brazil**, **Switzerland,** and **Austria**). This requirement may be implicit according to the jurisprudence, says the **Brazilian** rapporteur about the freedom of panorama. The **Italian** rapporteur insists on the need to preserve the moral right of paternity. He recalls that the paternity right is always protected by the so-called mention of use: in any case the title of the work and the name of the author always have to be mentioned. At the same time, he notes that the legislator himself recognizes that in certain cases the mention of the source may appear impossible. The **Austrian** rapporteur indicates that the way the source is to be mentioned may vary upon the circumstances and the good practices. Also the **Czech** rapporteur notes that the mention of the source depends on what is feasible and customary. Common sense and rule of reason also play a role in this regard, as suggested by the **Polish** report. As an example, the Polish rapporteur mentions a case where photos were shown in news feed for a time no longer than 2 seconds. The court decided in that case that the source did not need to be mentioned.

The **French** rapporteur adds that the quotation may not be prejudicial to the author. The **Polish** report indicates, in the same sense, that the quotation could be contrary to the right of integrity in case of a biased choice of quotation which could generate a false impression.

In several national reports, a special attention is paid to parody. Particularly the limits aiming at preserving the moral rights of the author are delicate for this kind of use. The **French** rapporteur notes in this regard that the parodist must respect the "rules of the genre" and may not cause an excessive denaturation of the work. In the same direction, the **Brazilian** rapporteur mentions that the parody may not cause discredit. The **UK** and **Belgian** rapporteur both refer to the jurisprudence of the Court of Justice in the *Deckmyn* case, where the Court has found that even in the context of a parody, the copyright owners keep a legitimate interest in having their work not associated to racist or discriminatory messages. The developments of the **UK** law are quite specific and complex in relation to parody. The UK rapporteur observes that when he (quite recently) adopted the exception of parody, the legislature decided to include a reference to the need for a fair dealing with the original work, so to minimize the potential harm to relevant copyright owners. This seems to mean that the user may only make use of a limited, moderate amount of the initial work. Moreover, the parody involves a treatment of an earlier work, whereby such treatment might be prejudicial to the honor or reputation of the author of the original work.

A number of national rapporteurs (**Switzerland**, **Austria**, **France,** and **Belgium**) conclude that a fair balance has to be struck between the uses covered by the exceptions and the respect of the moral rights of the author. On one side, to the benefit of the user of the exception, there is e.g. the fact that by their very nature certain exceptions necessarily affect the moral rights, in particular the integrity of the work, and the fact that the source is sometimes hard to mention. On the other side, to the benefit of the author, there is the fact that the permitted use may not cause an excessive denaturation of the work, and the fact that the mention of the source must happen in compliance with good practices. The **Belgian** rapporteur refers to EU law which confirms the need to maintain a fair balance between the rights and interests of respectively the copyright owners and the users.

3.8 The interaction between exceptions and technological measures

Obviously, technological measures aiming at the protection of the work (hereinafter TPMs) could have a negative impact on the benefit of the exceptions. Actually, the TPMs are likely to paralyze the exceptions. Therefore, it is worth investigating if and to what extent the national copyright laws allow the TPMs blocking the exceptions, or on the contrary, help the users in benefiting from the exceptions.

The interaction between TPMs and exceptions is regulated in the Directive 2001/29/EC, so that the laws of the Member States have to be interpreted and applied in conformity with said Directive.

The **French** rapporteur emphasizes that under his author-centric law, the users do not have a right to the exceptions. This means that in practice, the TPMs can prevent a user from benefiting the exceptions. In such a situation, the user has no choice but negotiating an agreement with the copyright owner. That being said, if no agreement is found, the high authority HADOPI may help in finding a balanced solution.

As noted by the **Austrian** rapporteur, it is only in the event that voluntary measures are not taken by rights holders (e.g. through an agreement with the user) that there is some obligation for the national legislature to allow for enforcement of the exceptions in favour of the user. But in a number of EU-countries, including **Austria, Belgium** and **Romania**, that obligation upon the legislature does not apply when the objective is to enforce the private copy exception. Actually, as observed by the **German** rapporteur, only a (too) short list of exceptions is concerned by that obligation upon the right owners to guarantee an effective benefit of the exceptions. In addition, the legislature has no obligation to facilitate the benefit of the exceptions with regards to works that are the subject of an on-demand exploitation. Concretely, in **Belgium** e.g., the users have standing to apply for a judicial injunction to obtain an actual benefit of the exception. A similar solution seems to be envisaged under **Hungarian** law, but at this stage, the procedure does not appear to have been put into place yet. In the **UK**, the user may issue a notice of complaint to the Secretary of State.

Moreover, as observed by the **Belgian** rapporteur, the user is exposed to criminal sanctions if he circumvents TPMs or he commercializes tools or services which are aimed at circumventing TPMs. The **Austrian** rapporteur emphasizes that those sanctions are applicable even when the ultimate use of the work – although not authorized by the copyright owner - is permitted by law. As the **German** rapporteur says, beneficiaries are not allowed to crack the protection themselves with the aim of benefitting from an exception.

In this respect, the **Polish** rapporteur takes the view that additional legislation work is welcome to make clear in the future that users may remove or circumvent TPMs, without being exposed to criminal sanctions, when the objective is to benefit from uses that are permitted by law.

In non–EU countries, sanctions are provided in case of activities aiming at the circumvention of TPMs. But there is apparently very little to no legal basis for remedies in favour of users who seek to obtain an actual benefit of the exceptions and who are prevented from such a benefit due to TPMs. In this regard, the **Swiss** rapporteur notes that there is no obligation for the copyright owner to provide the means of benefitting from an exception to users, which may impede the effectiveness of exceptions. Likewise, the **Brazilian** rapporteur observes that his law is not concerned with determining that the author / right holder allows such exceptions to be fully exploited, nor does it evidence what the remedies would be in the case of a technological barrier against reproduction or one that prevents the full enjoyment of a legal exception.

3.9 Catch-all exception

Unsurprisingly, all the national rapporteurs for the EU Member States confirm that their national law does not provide for a catch-all exception, such as a fair-use exception. Actually, the absence of such a catch-all provision results logically from the fact the list of exceptions in the Directive 2001/29/EC is a closed one (see above). The EU legislature has deliberately put into place an exhaustive list which details very precisely all the conditions

governing each and every exception. Furthermore, the first step of the three-step test, namely the requirement that the exception must address a special case, disfavours the adoption of a catch-all exception.

Hence, the national laws of the EU Member States make use of narrowly defined exceptions. Moreover, due to their exceptional nature, the provisions are subject to a restrictive interpretation (see above). In other words, says the **Italian** rapporteur, while US law limits the subject matter of copyright in a pragmatic way by applying open and flexible evaluation criteria for the judicial definition of unauthorized uses, EU national copyright laws like the Italian law strictly defines and limits the extent of free uses.

However, in some special cases a broader interpretation of written exceptions can be necessary to ensure conformity with the Directive and/ or higher internal rules (e.g. in **Germany**, Basic Law for the Federal Republic of Germany). Flexibility can also be explained by the purpose of the exception. The **Czech** rapporteur notes in this respect that under his national law, the free use for the personal needs of a natural person deserves a broad interpretation, i.e. it extends to each and any form of "copying", i.e. not only to make a reproduction. This broad interpretation, i.e. extension of the "fair use" for each and any form of "copying" for personal or internal needs is justified by the teleological approach, i.e. by the true intent of the legislature.

But apart from the foregoing, generally speaking the EU national systems show rigidity rather than flexibility. The **Polish** rapporteur observes in this respect that his national law does not allow for developing any new "hybrid" kinds of permissible use. For example, you cannot take different permissible use regulations and pick up selected use requirements from them to form a "combination" creating a new use category that would also be permissible.

As far as non EU countries are concerned, the **Swiss** rapporteur confirms that his national law does not provide for a catch-all exception.

In contrast, the **Brazilian** rapporteur indicates that it intends to bring a closed list of exceptions, the Brazilian Copyright Act ends up creating a "catch all" exception with item VIII of article 46. This provision, in short, permits the free reproduction in any work of short extracts from existing works, regardless of their nature, or of the whole work in the case of a work of three-dimensional art, on condition that the reproduction is not in itself the main subject matter of the new work. This exception allows, for example, the sample in music, the use of short extracts of audiovisual works in documentaries or even in works of fiction, among other uses of previous works. The Brazilian rapporteur takes the view that, even though the exact scope remains quite uncertain, it is consistent with the three-step step test.

3.10 Impact of fundamental rights other than copyright

At first sight, a number of factors tend to indicate that there is little room for accepting that other fundamental rights could limit or even paralyze the exclusive rights of the author: the other fundamental rights have already been taken into consideration to design the exceptions within the copyright law, the list of the exceptions in the copyright law is a closed one, the conditions governing the exceptions in the copyright law have been precisely designed so that they may not be carved out by external rules.

However, as may be reflected by the developments of EU law, i.a. the jurisprudence of the Court of Justice, it becomes increasingly clear that copyright may no longer be conceived as an intangible right, immune to other fundamental rights.

But not all the EU countries are already prepared to admit the interference of other fundamental rights.

For instance, the **French** rapporteur observes that under his national law, there is no general situation in which other fundamental rights permit the use without consent of the author (i.e. a "general" situation outside copyright law itself). This is to say that the exceptions themselves are already thought and provided in order to balance fundamental rights other than copyright such as freedom of expression, right to private life, right to education, and the right of the copyright owner. The formulation of those exceptions is already the result of this balance. The use must therefore comply with the conditions required for the application of the relevant exception.

However, it always remains possible for the judge to see an "abuse" of copyright, because the copyright, even in its prerogatives under the moral right, is not discretionary. Similarly, the copyright cannot confer any immunity in light of the violations of the rights of third parties, whether focused on personality rights, or simply the right of property. The **French** rapporteur admits, however that the reasoning might be different for rights that were not taken into account in the balance of the exceptions, such as competition law or consumer law. Hence, those considerations, can possibly, under certain circumstances, limit the exercise of the copyright owner.

In the same direction, the **Polish** rapporteur seems to indicate that even though free uses are often supported by external (constitutional) values – such as privacy or access to culture – they are only permissible if they stay within the strict limits of the legal terms provided by the copyright law. Likewise, according to the **Romanian** rapporteur, in providing for the exceptions to copyright so as to also balance the exclusivity inherent to copyright protection with other fundamental rights (e.g. freedom of expression, right to information, right to education), the Romanian Copyright Law has excluded to a very large extent the situations where, outside the gambit of the exceptions so provided, a balancing exercise between copyright and other fundamental rights ought to be performed. Courts therefore seem to prefer giving voice to other fundamental rights within the scope of the existing exceptions and not against such. In the same sense, the **Italian** rapporteur concludes that it can be said that the Italian legal system is not inclined to extend the copyright exceptions for the purposes of fundamental rights, since the latter are the foundations of the exceptions and limitations that can be found in the Italian Copyright Act. Basically the **Brazilian** rapporteur shares the same views. He observes that the exceptions contained in the copyright law are considered as the fair and prior agreement between the fundamental rights of the author of the work and those protected under the exceptions. This, however, he notes, is a view constantly challenged by more progressive scholars, who understand that the list of exceptions contained in the law cannot encompass all situations in which, for the protection of a fundamental right, copyright should be limited.

Some national rapporteurs, while they maintain that the exceptions in the copyright law are already the result of a balance between copyright and other fundamental rights, are open for taking into account external higher rules, like constitutional rules. The **Swiss** rapporteur for instance notes that the fundamental rights protected by the Constitution should be taken into account when interpreting a copyright exception, even though they shall however not serve as a basis to extend or create a new exception to copyright. Also, the **Hungarian** rapporteur observes in the same sense that a new provision - forcing the courts to take into account the Hungarian Fundamental Law - could open the door to the possibility of giving effect to other fundamental rights and interests as incorporated by the constitution in cases concerning copyright law. The same rapporteur takes the view, however, that in practice, that provision should have little impact since the principle of strict interpretation is expressly confirmed in the copyright law and should prevail in the end.

Other rapporteurs indicate that their systems could show more openness to interference by other fundamental rights. The **Austrian** rapporteur notes that the Austrian Supreme Court repeatedly recognized that the fundamental right of the freedom of expression protected by Article 10 of the ECHR can restrict the copyrights in the individual case, even though only in extreme cases. The **Belgian** rapporteur explains the reasons why the Belgian authorities are particularly willing to take other fundamental rights in consideration when addressing copyright claims. Belgian courts have referred a number of cases to the Court of justice in this respect. As a result, the CJEU has developed a jurisprudence which made it clear that national authorities are under the obligation to strike a balance between the protection of copyright and the preservation of other fundamental rights such as freedom of expression, freedom to conduct business and respect of privacy (see CJEU judgments in *Scarlet*, *Sabam*, and *Deckmyn*). Furthermore, to justify the need to strike a balance with other fundamental rights and other rules, the Belgian rapporteur also refers to the jurisprudence of the European Court of Human Rights and to the rules relating to Competition law. The **UK** rapporteur also refers to the need to balance copyright with other fundamental rights, i.a. in light of the jurisprudence of the CJEU.

3.11 Right to a compensation

Questions arise as to whether, having regard to the limitation or even the setting aside of the copyright, the author has a right to a compensation.

There are significant differences between the various national systems - even within the EU.

For instance, the **UK** rapporteur mentions that his national law does not provide a compensation in favour of the copyright owner. The solution is identical in **Brazil**. The **Brazilian** rapporteur notes that exceptions are absolute and do not give the copyright holder the right to be paid.

In contrast, in the vast majority of the countries, there is a compensation in favour of the right owner for certain uses, while for other uses, there is no remuneration. This hybrid system applies to **Germany, Switzerland, Austria, Italy, France, Poland, Czechia, Romania, Belgium,** and **Hungary.**

Even though the principle of a hybrid system is the same for all these countries, there are differences from country to country with regard to the exceptions that give right to a compensation and those that do not.

The first category includes the private use (**Germany, Switzerland, France, Czechia, Romania, Belgium, Hungary**), the educational use (**Switzerland, France, Belgium**), the use for scientific research (**Belgium**), the use by people with disabilities (**Switzerland**), the use by social institutions for the benefit of their members (**Italy**).

Even though some of them contain developments in this respect, most national reports abstain from detailing the various aspects of the compensation, in terms of calculation, and mechanisms aimed at preventing overcompensation.

3.12 The making of temporary copies

In the digital environment temporary copies are extremely frequent. Also, in many case they are necessary to enable a lawful use. A lot of activities and business models are likely to be confronted with them. Therefore, the exception permitting their making is of utmost importance. This exception is included in the Directive 2001/29/EC. But questions arise as to whether the wording of this exception – both in EU and non-EU countries, if applicable - is sufficiently effective to allow the development of most of legitimate online activities and new business models.

The exception at stake is expressed in article 5, par.1, of the Directive 2001/29, which reads as follows:

> 1. Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:
> (a) a transmission in a network between third parties by an intermediary, or
> (b) a lawful use
> of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.

As far as non-EU countries are concerned, both the **Brazilian** and **Swiss laws** contain a similar provision.

The **Swiss** rapporteur informs that the Swiss provision is modelled on the corresponding provision in the EU Directive. Actually, there is no divergence.

In contrast, the **Brazilian** provision shows certain differences. It reads as follows:

> The exclusive right of reproduction shall not be applicable where the reproduction is temporary and done for the sole purposes of making the work, phonogram or performance perceptible by means of an electronic medium, or where it is transitory or incidental, provided that it is done in the course of the use of the work that has been duly authorized by the owner.

The respective national reports contain the following comments in this respect.

As observed by the **Polish** rapporteur, the exception plays a useful role to permit the following uses: (i) reproduction in a computer's RAM when a CD is being played; (ii) making copies during internet browsing; (iii) storage in cache memories, proxy servers or internet routers. The **Romanian** rapporteur adds that under his national jurisprudence, this exception has been successfully used to permit the reproduction of musical works on a computer/server for the purpose of enabling subsequent streaming. He concludes that the current interpretation of the limitation, under his national jurisprudence, seems permissive enough to allow most legitimate online activities, possibly even those activities based on a model of p2p distribution. The **UK** rapporteur mentions that the exception is also applicable to also apply to temporary copies generated by an internet end-user. The **Hungarian** rapporteur mentions still another possible successful application of the exception, with regard to IPTV services, that is, the provision of television 'broadcasting' services based on broadband internet protocols in a digital (encrypted) format. According to the Hungarian Council of Copyright Experts, the reproduction of such works by the IPTV service provider by utilizing its own facilities was deemed to fulfil the requirements of the exception because it was necessary for facilitating subscribers' lawful use. It was, therefore stressed that such interim reproduction of licensed works had not carried any independent economic significance.

However, beyond those permitted activities, there are undoubtedly a series of activities that clearly do not satisfy the conditions of this exception. In particular, the exception proves inapplicable to some streaming activities, to VCR-online services and to Google news activities.

This inapplicability may not surprise since the conditions of the exception set quite high standards. In this respect, the **Swiss** rapporteur makes a useful in-depth analysis. He first emphasizes that the four conditions need to be cumulatively met. Then, he comments on each of the four conditions. It appears that said conditions are particularly demanding requirements. In a nutshell, by way of examples, the following copies may be problematic (i) a copy that is stored for several days (because it is not transient), unless it only facilitates another use's process (in the latter case it is incidental) (ii) a copy that is not deleted automatically (because it is not part of an integral and essential part of a technological process) (iii) a copy that does not enable a use which either is authorized by the copyright owner or permitted by law (iv) a copy that can be substituted to a permanent copy (because it could generate revenues in that case, and therefore it would have an independent economic significance). Despite the demanding character of the exception, according to the **Swiss** rapporteur, it strikes a right balance between the interests at stake and is effective to enable the development of legitimate online activities/new business models.

The **German** rapporteur made a detailed analysis on the technical side in relation with streaming platforms and portals. This analysis reveals a.o. that streaming activities may not benefit from the exception in particular when they are related to sources that are evidently illegal. In the same sense, the **UK** rapporteur confirms that conclusion, stressing that the CJEU has excluded that the exception within Article 5(1) of the InfoSoc Directive would apply to viewers of unlawful streams (*Filmspeler*).

Commenting on a judicial decision, the **French** rapporteur observes that the exception of transitional copy cannot be invoked in the hypothesis of a "VCR online" service which offers to its subscribers the possibility to record television programs and to access their request of records, after decryption of those, since the copy made by the operator will be able, once decoded, to be retained in a definitive manner by its user. The Court found in that case that the copy had an "own economic value", considering the advertising revenues directly related to the number of users of the service and the volume of copies made for the account of these users.

The **Belgian** rapporteur mentions that under her national case law, the exception was found inapplicable to the Google News service. In short, the facts were as follows. The Google News service offers a selection of information from press articles. The mechanism is as follows: Google exploits the web servers of news organizations, copies and / or automatically summarize them in order to establish an information portal. This portal contain articles of the day or articles which correspond to the user's request in the search bar of the Google News service. Google News only provides a few lines and the title of the article but then refers to the agency's own website through hyperlinks. One important point is that the mechanism set up by Google also allows access to press articles that are no longer online on the agency's own website. All those actions are done without any

prior authorization from the copyright holders. In appeal, the court found that Google was unable to demonstrate the technical necessity to ensure an effective transmission of the copy made by the company. Consequently, the third condition according to which reproduction must constitute an integral and essential part of a technological process was not met. In addition, the court observed that the copy was not transitory or accessory in the present case. The cached copy was not limited to what is technically necessary to ensure the proper functioning of the service because, in reality, the copy remained as long as the press article itself was accessible on the original site, and beyond.

3.13 Exceptions allowing the freedom of expression

The national reports mention a number of exceptions listed in their respective national laws which are rooted within freedom of expression. These exceptions include mainly review or criticism, quotation, news reporting/ reporting of current events, freedom of panorama and parody.

Commenting on parody, the **UK** rapporteur emphasizes that under his national law, this exception is subject to fair dealing conditions, which means that the parodist may only make a moderated, limited use of the initial work. She considers that at first sight, the UK exception in this regard is less broad than the corresponding exception under French law.

Many national reports refer to the exception relating to "current events". Different issues may arise in this respect.

According to the **Swiss** case-law, a press article does not form in itself a "current event", so that the exception of reporting of current events cannot be used to reproduce it in its entirety.

However, it may happen that under certain laws works may be freely disseminated in their entirety for information purposes, in the context of "reporting over current events". The **French** rapporteur mentions in this respect an exception permitting the free dissemination of public speeches in their entirety. A number of significant limits have been set though. In particular, the work must consist of a speech intended for the public, and the dissemination must occur via the press or broadcasting. But in the first place, the dissemination must pursue an objective of reporting over current news. As a consequence, the exception does not permit to publish a book of non-recent speeches. In contrast with that speech-related exception, under the general quotation-related exception, it is an absolute requirement that the quotation must be short. On another note, apart from the length of the copy, also the news-related character appears decisive. The **French** report refers in this regard to the press review exception which is confined to topics of current concern, as opposed to non-ephemeral topics.

In relation to "reporting over current events", the **Belgian** rapporteur explains that this exception is justified only under circumstances where the user has no time to obtain the copyright holder's consent. As a consequence, Google News has been denied the benefit of that exception, because it used the works (press articles) for a period of 30 days, while during such a period, it was perfectly possible to obtain the right owners' authorization.

The **Swiss** report reveals that under his national jurisprudence a quotation must be limited to a short extract so that it does not permit the reproduction of an entire press article. The **Italian** rapporteur emphasizes that the quotation may not be for commercial purpose and that it may never compete with the original work.

The **Polish** report details the various issues which may arise concerning the quotation-exception. One of those relate to the purpose of the quotation. The rapporteur emphasizes that the quotation must be "necessary" in that it must illustrate the views of the individual who makes the quotation. The **Belgian** rapporteur also emphasizes the importance of the objective pursued by the quotation, namely criticism, controversy or review. Hence, the Google News service has been denied the benefit of the exception because it used the work (press articles) without pursuing any objective of criticism, controversy or review.

A significant number of national reports reveal that under free speech-related exceptions, no remuneration is due to the author. E.g., the **Brazilian** rapporteur notes, in relation to parody and freedom of panorama, that these exceptions are mandatory and they do not give rise to compensation. Likewise, the **Austrian** rapporteur indicates, in relation to the quotation-exception that the right holder is not entitled to remuneration. The same observation is made in the **Polish** report.

3.14 Subject matter excluded from the benefit of copyright protection

In many countries, copyright protection is denied to certain subject matters, like political speeches, official documents, news of the day or mere items of press information. The question arises as to whether the national lists of unprotected material is sufficiently comprehensive.

In this regard, the **Swiss** rapporteur mentions that his national list does not exclude news of the day and mere items of press information. He notes, however, that such types of "works" may not be considered original enough to be protected by the copyright law. Likewise, the **Austrian** rapporteur observes that mere items of press information that simply report mere facts and statements without further commentary are not considered to be "works" due to their simple nature and therefore do not enjoy copyright protection. In order for a press section to be considered a work, it has to reflect an individual intellectual activity. In the same direction, in relation to "simple press news", the **Polish** rapporteur notes that it includes primarily factual press items without any analysis or commentary by the author, such as exchange rate quotations, stock exchange quotations, weather reports, TV or radio listings, movies or theatre schedules. Importantly, this category can include also more "complicated" or "sizeable" news items provided that their only and core benefit is to give information that some fact(s) occurred (news of natural catastrophes, poll results, sports results, staff changes in law firms, etc.).

The **Romanian** rapporteur takes the view that the list containing the ineligible subject matters is a closed one. But, at the same time, he considers that this is not really embarrassing because the courts use that list simply as a complement to the basic criteria for copyright protection.

It seems to result from the national reports that, generally speaking, there is no concern about the fact that a national list would omit a subject matter that evidently does not deserve copyright protection. In most cases of this kind, the general standards for eligibility may perfectly serve to exclude that kind of subject matters. In particular, the originality test or the notion of creation will be helpful to conclude that the subject matter at stake does not match the criteria. This being said, situations may occur where the subject matter, although consisting of an original creation, should be ineligible for copyright protection. That is for instance the case for public speeches in public court hearings. In this last case, it is worth permitting the free use of the speeches, but only to the extent it is required for public information purposes.

3.15 Education exceptions

Because, more than ever, education is key, especially in the information society, it is worth verifying whether the national systems are sufficiently performing in this respect, in particular in the field of distance education.

Evidently, most countries realize that progress has to be made on this subject. According to the **UK** rapporteur, UK copyright law has recently broadened its education exceptions, which also cover distance learning.

It appears that in some countries, at this stage, the education exceptions remain quite limited. E.g., for **Brazil**, the rapporteur refers to low level exceptions, like the permission for the student to make a transcript of the class.

But even in countries which tend to be more favourable for free education uses, generally speaking, said uses come up against a number of major difficulties which could paralyze some learning activities, in particular

distance learning. These difficulties frequently result from the demanding wording of the conditions which the uses are subject to. These conditions may vary from country to country, even though a number of them are common. The following obstacles may be mentioned in this respect: free use is limited to small parts of the work; not every kind of work is eligible for free use; free use may only be made by official, non-profit institutions; free use may only be made for illustration of teaching, so that other education activities like preparation or follow-up; communication through computers must take place on the premises of the institution; communication must take place through a secure if not a closed network; a remuneration is due to the author. Some extracts of certain national reports deserve special attention when it comes to illustrate the above.

The **Swiss** rapporteur notes that under his system, the education exception typically applies at all levels (kindergarten, primary school, middle and high school and universities) whether public or private. While it is apparently debated, the Swiss rapporteur takes the view that this exception should apply to distance learning to the extent access controls to the lectures and teaching materials (i.e. providing access only to the teacher and the students) are properly implemented, as this would in principle satisfy the "triple test". The Swiss law does not explicitly distinguish according to whether the classes are held within a non-profit organization or in a commercial environment. However, some scholars are of the view that the educational exception should not apply in the context of continuous education especially when it is organized by a for-profit organization.

The **German** rapporteur notes that under his law, it is permissible to make available small parts of works for illustration in teaching. Distance learning institutions are also beneficiaries of that exception, even though they have to make use of technical protection measures (e.g. passwords for online-platforms) in order to make sure that the work is only made accessible to the participants of the instructed group. A number of additional limits are set. Beneficiaries must be non-profit institutions. Only small parts of the work may be made available. The purpose must be to illustrate teaching. But the Government considers to amend the system in order to broaden the exception. In the future, the exception should also apply to preparation and follow-up learning activities, beyond the teaching itself. In addition, the law will clarify the notion of "small" parts of the work.

The **French** rapporteur mentions limits that are common in many countries, like the kind of works that may be used, the amount of the work that may be freely used (in terms of "extract"), and the exclusion of other activities than the teaching in the strict sense. Also, he comments on the remuneration which is due to the author.

The **Austrian** rapporteur notes that the exception is not applicable to works which, according to their nature and design, are intended to be used in schools and/or teaching purposes. He regrets that distance learning is not favoured. In this respect, he observes that institutions for profit may not benefit from the exception. Furthermore, wording like "to the extent that this is justified by the respective purpose" leads to considerable legal uncertainty.

The **Polish** rapporteur considers that under his law, the education exception is much broader than in many other countries. He emphasizes in this regard that it expressly covers distance learning as well, provided that the students have been identified by the institution. In contrast it does not permit organising open mass participation on-line courses (MOOCs), being on-line courses open to an unlimited number of participants who are not known even to the educational institution that is organising the course. Under Polish law, no remuneration is due to the author.

Interestingly, the **Belgian** rapporteur mentions that the Belgian legislature has put in place a specific exception in order to promote distance learning, which permits free communication subject to a number of conditions. First, the beneficiary must be an institution recognized or officially organized by the public authorities. Secondly, the communication must take place through a secure communication with appropriate measures. Third, the communication must be within the normal activities of the institution. Then, the classical conditions for teaching exceptions are also required for distance learning. The communication must be done only for the purpose of illustration of the teaching, without seeking a profit and without undermining the normal exploitation of the work. Finally, the source and name of the author must be indicated unless this is impossible.

Commenting on distance learning, the **Hungarian** rapporteur notes that communication of the works for education purposes may only take place through computers terminals, if those devices are operated on the premises of educational institutions. He concludes that therefore, in its present form, the Hungarian copyright act

precludes the possibility of providing copyright material for students at remote locations under the free use regime.

3.16 Big data related activities

Big data is clearly strategic for the economy. Therefore, it seems indispensable to check whether big data related activities – which imply text and data mining – are facilitated through effective exceptions by the national laws, in their current version or in a version to be adopted in a near future.

In essence, text and data mining is an electronic process for machines to explore and analyse very large quantities of data (texts, images, or any other kind), including copyright protected works, in order to extract relevant information. This exploration process makes it necessary to make copies of the data; which means that when the data consist of protected works, said works are reproduced. Because the copies concern huge amount of works and they are made in recording time, it is hardly conceivable to obtain the consent of the author. As a consequence, an exception seems indispensable.

The **Belgian** rapporteur explains that the exception of temporary reproductions (see above) might be inapplicable in this regard, i.a. because it is not established that the copies are temporary and they have no independent economic significance.

As the **German** reporter indicates, the critical point in relation to big data is that to gain evaluable datasets it may be necessary to reproduce works in huge quantities by automatic means. Hence, an exception to this end appears appropriate. However, the conditions under which the works should be freely reproduced need a close attention. Different aspects have to be taken into consideration in this regard, in particular the purpose of the use and the profile of the beneficiaries.

In the EU proposal of Directive of September 2016, the exception relating to text and data mining is mandatory and should serve both for non-commercial and commercial purposes. At the same time, its benefit is limited to research organizations.

The UK rapporteur emphasizes that the UK law is different from the EU-proposal at least in two respects. First, it is limited to non-commercial use. Second, it is open for any lawful user, while the EU exception may be used by research organizations only, namely universities, research institutes, non-profit or public interest research-intensive organizations. **France** has also adopted a text and data mining exception for non-commercial purpose only which allows the reproduction of works without limitation in terms of volume or format.

At this point, the **German** law does not provide for an exception. But, the Government prepared a draft bill. According to this draft, an exception will allow text and data mining for science and research purpose. As a result, it will be permissible to make works available to a limited circle of persons for joint scientific projects and to third parties in order to make it possible for them to verify the scientific quality. The exceptions will only apply if the user pursues non-commercial purposes. Likewise, a pre-draft has been prepared in **Switzerland** to permit text and data mining.

Austrian copyright law does not yet provide for a text and datamining exception. Neither does the copyright law in **Romania, Belgium** and **Hungary**. This leads the Hungarian rapporteur to conclude that with regard to the interest of furthering scientific advancement, it would be wise to re-consider the scope and applicability of free use exceptions to accommodate the needs of technology based on big data analytics.

3.17 Exhaustion of copyright

The notion of exhaustion of intellectual property rights is fundamental under EU law, since it is directly related to the essential freedom of free movement of goods. Moreover, it has been expressly included in the Community legislation, and as a consequence, it has been interpreted as a community notion. The *Usedsoft* jurisprudence of the Court of Justice has made it clear that to some extent, exhaustion may be applicable with respect to intangible copies. In particular, the Court decided that when the copy of a software has been authorized for download and for subsequent use for an indefinite period of time, and when the value for that consent is the same as the economic value of the copy, this operation constitutes a purchase agreement; as a consequence, the copy may be further distributed, the copyright owner not being longer in a position to oppose such a distribution.

The question arises as to how that jurisprudence is applied in the Member States, also in relation with non-software works. Another question is whether a similar jurisprudence is applicable in non-EU countries.

In this last respect, as far as **Switzerland** is concerned, it seems that the *Usedsoft* solution is basically applicable. However, it ceases to apply in situations where the work has been licensed for a limited amount of time, which occurs e.g. in the field of entertainment with respect to licenses granted to consumers.

The **Brazilian** rapporteur notes that the Brazilian copyright law follows the exhaustion of rights upon first sale. But he does not report any specific solution with regard to digital works.

The **German** report is probably the most emblematic for EU Member States countries. The German rapporteur provides for interesting comments regarding the *Usedsoft* solution. He notes that although the exhaustion principle refers to tangible goods, and therefore does not directly apply to online-distribution of works, the (controversial) question is whether it can be applied by analogy to cases dealing with digital works ("online-exhaustion"). German Courts and some legal scholars are of the opinion that this is not the case. They point out, a.o., that the CJEU's UsedSoft-judgment cannot be transposed to other digital works than software, because the legislation is not the same (two different Directives). Additionally, recital 29 of the InfoSoc-directive explicitly states that "the question of exhaustion does not arise in the case of services and on-line services in particular". Finally they emphasize that from an economic point of view tangible copies and digital works are not comparable: whereas traditional storage devices like CDs are subject to deterioration, this is not true for files so that works on the primary and secondary market directly compete with each other without qualitative differences. Furthermore, files could be reproduced without loss and any number of times. However, the arguments above can be rebutted. First of all, recitals of directives are not binding and in addition recital 29 of the Directive 2001/29 appears outdated. Second, the EU Usedsoft teaching may be a valid model for digital works. In economic terms, it is not understandable why the traditional book buyer should be able to resell the book whereas e-book buyers do not have that possibility. Any other result would provide copyright proprietors with the possibility to circumvent the principle of exhaustion by only relying on online-distribution. At the same time, it is the copyright proprietor's very own risk that digital works do not deteriorate when he decides to open up to the online-distribution market. Additionally, the possibility of numerous reproductions is irrelevant for the right of distribution and the question of exhaustion. The right of reproduction never exhausts so that each and every reproduction has to be covered by another exception to copyright. Finally, any other result would eliminate a functioning digital single market within the European Union. This being said, as long as the legal discussion goes on and judgments of the highest courts do not clarify the legal situation, one cannot say that the current copyright law sufficiently acknowledges the challenges of the digital society. The lawmaker is consequently asked to explicitly extend the principle of exhaustion to cases of online-distribution.

And indeed, in many other EU Member States, there is uncertainty about the discussion as to whether exhaustion is available as a general principle applicable to any work under any format (including non-software work in digital format), or rather it only applies to digital copies of computer programs. This uncertainty is reported by the national rapporteurs for **UK, Austria,** and **Belgium**. The **Polish** rapporteur also notes the same uncertainty, even though he seems inclined to mention a slight preference in favour of a liberal construal allowing for online exhaustion in general.

Having said that, the **French** rapporteur refers to a decision of the French Supreme Court which seems to extend the position by the CJEU in the UsedSoft judgement, at least with regard to music files distributed online. In contrast the **Italian** rapporteur seems to maintain that with reference to copies originated by downloading the work in digital format, instead, the rights to public communication and reproduction must be taken into account. In this case, circulation of the copies made by transferring the work in digital format to a storage media is subject to the right holder's authorization, because their transmission through digital channels does not exhaust the distribution right. In the same sense, the **Romanian** and the **Hungarian** rapporteurs recall that their laws expressly exclude exhaustion in respect of the making available right, which would apply to online situations where the work has been made available in a digital format.

3.18 Panorama-exception

Many countries provide for an exception ensuring the freedom of panorama with respect to works permanently situated in public places, such as buildings or sculptures. As a result, said works may be freely used, to a certain extent.

Also here, detailed conditions seem appropriate to limit the permitted use, as to the format, the purpose and the profile of the users. But the specific conditions in this respect tend to vary from country to country.

With regard to the format, the concern is that the permitted use should be prevented from competing with the initial format. The **UK** law provides in this respect that the use shall consist of the making of a graphic representation, a photograph, a film or an image. The **Swiss** law refers to a depiction, whereby the depiction may not serve the same purpose as the original work. Many countries provide for similar limitations (to a greater or lesser extent) with respect to the format, e.g., **Brazil**, **Austria**, and **Poland**.

The **French** law provides that the use must be made by an individual and may not pursue a commercial purpose. Also the **Romanian** law does not permit commercial uses. In contrast, commercial uses are permitted in other countries, including **Austria**, and **Poland**.

In certain countries, such a **Belgium**, the limitations are more far-reaching in that the permitted use may not have as purpose the work itself.

The **Italian** law does not provide for a panorama-exception. However, there are provisions in specific laws concerning cultural goods and public domain goods which facilitate the making of photographs.

3.19 Reprography, private copying and other private uses

The national reports all comment on exceptions related to reprography, private copying and other private uses. The terminology may be shortly clarified in this respect. Reprography refers to the reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects. Private copying refers to reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial. Other private uses refer e.g. to a communication in a family circle.

Although these topics are at first sight distinct subject matters, they prove interrelated. For instance, the *HP vs Reprobel* judgment of the Court of justice made it clear that although the provision of the Directive 2001/29 does not make that distinction, with regard to the exception of reprography, a distinction has to be made according to whether the reproduction is made by any user or by a natural person for private use.

Said topics have given rise to immensely complex debates. Some of the main questions raised about reprography and private copying are: Do they also cover counterfeit copies made from unlawful source? Can the national law

provide that the fair compensation in favour of the authors will be allocated (at least in part) to the publishers? How should the fair compensation be calculated?

The CJEU answered as follows – in short. With regard to the unlawful source: the exceptions relating to reprography and private copying may not apply to counterfeit reproductions made from unlawful source. With regard to the allocation of a part of the remuneration in favour of the publishers: the Belgian system as submitted to the CJEU is not valid in that it does not guarantee that the publishers are under the obligation to ensure a direct or indirect benefit to the authors. With regard to the calculation of the fair compensation: within some limits, Member States are allowed to set up a system providing for two forms of remuneration, namely a lump sum and a proportional remuneration.

The objective of the current report is not to comment on each and every piece of national legislation in the various countries concerning these topics. Rather, it seems appropriate to make some general findings.

Private use in general extends beyond private copy to include other forms of private uses like the lending of copies to close friends.

Private copies may be made outside the family circle, by a third-party service provider, even though they must be for the personal use of the commissioner (as noted in the report for **Poland,** and **Switzerland**). The **French** rapporteur notes that under the current law, the maker of the copy and the user must be one and the same person. However, he mentions that a shift is expected, i.e. in the future it will be admitted that the copy may be made by a third party if ordered by the final user. The **German** rapporteur mentions that reproductions made by others are covered as long as no payment is received therefore or the reproductions are on paper or a similar medium and have been made by the use of any kind of photomechanical technique or by some other process having similar effects. Yet, the exception applies to reproductions of individual contributions released in newspapers and periodicals and small parts of a released work made by public libraries that are transmitted by post or facsimile as long as it is for the commissioner's personal use. For the reproduction and transmission of works in other electronic form further criteria have to be fulfilled.

In certain countries**,** private copies are permitted regardless the size of the work copied, i.e. the whole work may be copied and not just extracts (**Poland**), while in other countries, the copy is only permitted to the extent that it is limited to short extracts (**Brazil**).

In certain countries, there is no remuneration for the author of the work copied (**Brazil**), while in other countries, there is such a remuneration (**Switzerland and EU member States**, see i.a. reports for **France**, **Italy, Austria, Poland, Czechia,** and **Hungary**), either indirect (**Switzerland,** and **Poland**), or direct, or both (**Belgium**). It shall be noted on this last point that the CJEU admitted the principle of a twofold remuneration, subject to some limitations (*HP vs Reprobel*).

Private copies made from unlawful source deserve special attention. According to the jurisprudence of the **CJEU** (*ACI Adam*), they are not covered by the exception, and therefore, they do not give rise to a payment in the framework of the system of fair compensation which applies to permitted private copies. That being said, some EU national laws seem to provide that the person who makes the reproduction from unlawful source is only deprived of the benefit of the private copy exception if the source used is obviously unlawful (**Germany**, and **Austria**).

Apart from the general findings above, it is worth noting that the exception for personal copies was quashed in the **UK** for the reason that the exception as formulated in the law did not provide for a fair compensation.

3.20 Global assessment of the balance between copyright owners rights and users rights

In the global assessment of the balance of rights – namely the rights of the right owners, on the one hand, and the rights of the users, on the other hand - a distinction should be made between EU countries and non EU-countries. The former countries are expected to stick to the general policy of the EU legislature and the CJEU in managing the balance pursued. The latter countries are supposed to have a higher degree of freedom of action. With respect to that distinction, the UK takes a specific place, as a result of the Brexit, and also as a result of its tradition of common law.

Precisely the **UK** rapporteur envisages opportunities in a scenario of "hard" Brexit. Possibly, she notes, the UK might decide to inject some additional flexibility into its own system of copyright exceptions. This might be so by means of: (i) an open-ended clause in addition to existing exceptions that would encompass uses that could not fall within the scope of the other exceptions and employ the language of the three-step test; or even (ii) introducing a system of fair use similar to that in place in jurisdictions like the US.

In the same direction, the **Swiss** rapporteur shows that there can be a temptation to adopt a catch-all exception. The upside hereof would be more flexibility, while the downside would be less certainty. Therefore, the rapporteur leaves the door open for new exceptions to consider for addition to the list, namely with regard to transformative use (user generated content), research and distance learning.

One of the main conclusions of the **Brazilian** rapporteur is that his national copyright law reveals a need for an urgent update. In particular, the legislature should adopt appropriate provisions with regard to online uses of works and more generally uses of works under digital format. Concerning the list of exceptions, one of the necessary additions should be the insertion of a special provision to favour the mass digitization of works for the benefit of libraries. Further modifications should seek to improve the legal certainty of the existing exceptions.

Turning to the EU Member States, the conclusions take another form.

Obviously, the **EU authorities** put a lot of efforts in forcing a real balance of interests between right owners and users. But at the same time they are dependent on the closed character of the list of exceptions.

EU Member States are supposed to find a strong guidance in the judgments of the CJEU. However, it seems that the teachings of said judgments take a lot of time before they find their way to an efficient translation into national laws. Moreover, directives are by definition quite general and therefore it should be up to the Member States to bring some specifications where convenient.

A significant number of EU-rapporteurs complain that their national provisions are either too vague or too narrow. Some examples are worthwhile to mention.

For instance, the **Polish** rapporteur regrets that his national law failed to specify or supplement EU law provisions in relation to orphan works, such as the obligation to make a prior "diligent search", or the determination of the "fair compensation", or the extension of the categories of orphan works. The same rapporteur seems to suggest that the jurisprudence of the CJEU concerning private copying and unlawful source should be supplemented under national law, by providing that the exception will apply in each case where the user has an at least reasonable belief that the work he is using was made available in a lawful manner.

The **Belgian** rapporteur (herein followed by the **Hungarian** rapporteur) also concludes that rigidity is one of the main weaknesses of the EU system of exceptions. She therefore pleads for a more flexible approach at national level. The solution she refers to tends to rely on categories of exceptions (i.e. teaching, culture access, freedom of expression). When this categorization is established, all the uses made in order to achieve the purpose would be, in principle, valid. This has the advantage to permit a dynamic interpretation by the judge and the preservation of the effectiveness of the exceptions. As a legal safeguard, the three-step test could be a precious guide for the judge in order to decide if an act of reproduction or communication to the public is legitimate *in concreto.*

The **Romanian** rapporteur is concerned about the uncertainty of the rules which is particularly prejudicial to the interests of the users. He proposes to facilitate declaratory judgments for the benefit of the users, even though it could be more preferable to bring more clarity in the legal texts themselves.

Whatever the direction for further developments, one thing is crucial for both the **Polish** and the **Hungarian** rapporteurs: there is a clear need for a permanent debate between the stakeholders, which, according to the Polish rapporteur, could even justify the creation of a platform to enable exchanges of views.

4. Conclusions and Resolutions

The national reports delivered a rich analysis on a significant number of exceptions, even though not all the exceptions were discussed.

The reports all reflect the need to fully respect copyright as a fundamental right, whereby the principles of the three-step test and a strict interpretation of the exceptions play a key role. At the same time, they realise that a balance has to be struck between the protection of copyright and the protection of other fundamental rights, whereby the exceptions and limitations to copyright are crucial.

The reports all point at critical concerns with regard to the said balance. These concerns are often over (i) the closed nature of the list of exceptions (ii) the rigidity of the limits and conditions which apply to the exceptions, and (iii) the uncertainty about the scope, the limits or the conditions of the exceptions. One of the challenges in this respect results from the fact that, to some extent, these concerns appear to conflict with each other. For instance, on the one hand, there is a need to clarify certain exceptions, while on the other hand, there is a risk that an excessive clarification would increase the rigidity of the system.

The objective of the current report should not be to detail the margin of potential progress in relation to each and every legitimate interest of, respectively, the right owners and the users. Moreover, these interests are currently discussed at appropriate levels, namely the WIPO and the EU levels, in the context of specific exceptions such as education, research, or big data.

Rather, the report should seek to find a general consensus about how to treat the balance between the rights of the right owners and the rights of the users, and how to tackle the concerns mentioned above.

Therefore, the conclusions and the proposals of recommendations here below are quite modest in that they focus on a general approach. Furthermore, they should be designed in such a way that they remain compatible with the different national traditions.

4.1 Conclusion 1

All the national reports reflect the importance of the three-step test. That principle is not only enshrined in the leading instruments on international and EU level, but also in practice it should really serve as a one of the most solid guidance for adopting and applying exceptions to the copyright. The greater the attention to other rights than copyright, the more relevant the three-step test.

Admittedly, there is some vagueness concerning the question as to whether the test has to be applied in abstract, or rather in a concrete way. In the latter case, the test is a tool for the judge to assess whether in the specific case referred to him each of the conditions is met. This is a reason to clarify that the test is not only a prescription for the national legislature when they adopt an exception, but also an obligation for the courts when they assess the admissibility of a defence in a specific matter. To this end, it is necessary to ensure an appropriate implementation of the three-step test into national legislations.

In light of the reasons above the first resolution adopted at the LIDC's Rio Congress 2017 therefore reads as follows:

LIDC stresses the crucial importance of the three-step test when exceptions must be interpreted and applied. It recognizes that the test has to be concretely applied by the courts when they assess if in the specific matter referred to them the users of the works are entitled to benefit from the exception they claim. National law should provide for such an obligation upon the courts.

4.2 Conclusion 2

There is a consensus about the fact that the balance between the rights and the interests of the right owners and those of the users of works is an essential principle. It appears that this main concept should serve as a guidance not only for the legislature when they adopt an exception, but also for the courts when they assess the merits of a claim or a defence in a specific matter. Admittedly, the national judges and the citizens are expected to know this leading rule. However, such a general principle might gain in transparency and also it could obtain a greater symbolic value if it were to be enshrined in national law.

Therefore, the LIDC adopted the following second resolution at the Rio Congress 2017:

LIDC emphasizes the particular importance of the balance to be struck between the rights and interests of both the copyright owners and the users of works. It recognizes that the balance has to be concretely struck by the courts when they assess if in a specific matter referred to them the right owners or the users of the works should succeed in their claim or their defence. National law should provide for such an obligation upon the courts.

4.3 Conclusion 3

Overall, there is a significant demand for a system providing for a clear identification of the cases which justify the application of exceptions and limitations. Such a demand fits in with the requirement made by the first condition of the three-step test that exceptions and limitations shall only apply in certain special cases. Furthermore, it tends to ensure a solid framework which favours predictability and transparency for the benefit of both the right owners and the users.

The discussion as to whether it is preferable to opt for a closed list of exceptions and limitations rather than an open-ended list is far from easy.

On the one hand, as it may appear from the experience within the EU, if the preference goes for the open-ended list, the risk is that the divergences between the countries will increase. This could have a major negative impact not only on the single market at EU level, but also, at a higher level, on the digital uses in general since said uses take place in a cross-border environment.

On the other hand, the national reports confirm that in light of the ever increasing technological developments, the rigidity of a closed system constitutes a major concern.

As a consequence, it may be wise to maintain a system based upon a closed list, while at the same time a special attention has to be paid to solutions which seek to ensure some flexibility. At this point, it does not appear that there is a clear-cut solution on the table concerning a flexible model which could achieve a consensus. But at least, the willingness to reach this consensus should be expressed at the level of LIDC.

Therefore, the LIDC adopted the following third resolution at the Rio Congress 2017:

LIDC notes that there is a significant demand for a solution ensuring a clear identification of the cases which justify the application of exceptions and limitations. Therefore it recommends a system which provides for a clear list of exceptions and limitations. While acknowledging the benefits of a closed list, LIDC is concerned about an excessive rigidity in this respect. Therefore, it recommends a system which is based on a closed list of exceptions, and it calls for a further reflection upon solutions which can provide for flexibility.

4.4 Conclusion 4

In line with the foregoing, many national rapporteurs point at the need to define in a precise and clear manner the scope of the exceptions as well as the conditions subject to which they will apply.

A number of examples in this respect are mentioned in the reports. For instance, several rapporteurs emphasized that a clarification is needed as to whether the exhaustion principle also applies to intangible copies of non-software works. Also, various national reports indicate that the users deserve more certainty with regard to private copying when the copy at stake originates from an unlawful source. This request for a higher certainty should be taken into consideration. Also, preference should be given to harmonization.

In light of the above, the following fourth resolution has been adopted at the LIDC's Rio Congress 2017:

LIDC notes that there is a significant demand for a solution ensuring a clear identification of the scope, the limits and the conditions relating to the application of exceptions and limitations. For instance, questions such as whether the private copying exception may apply even when the source is unlawful or whether exhaustion applies to intangible copies are still insufficiently settled. Therefore LIDC recommends that legal provisions should define said scope, limits and conditions in a clear and preferably harmonized manner.

4.5 Conclusion 5

The national reports note that where supranational instruments present the list of exceptions and limitations as an optional list, with the consequence that each country is free to adopt the exceptions or not, in whole or in part, the risk is that the divergences between the countries will further increase. Many reports indicate that such a risk may have negative effects on cross-border uses, in particular in a digital environment.

Therefore, the following fifth resolution was adopted at the LIDC's Rio Congress 2017:

LIDC recognizes that, where international instruments set out exceptions and limitations as being optional, that may have negative effects on cross-border uses, in particular in a digital environment.

4.6 Conclusion 6

Many reports give special attention to the fact that the exceptions and limitation may be undermined in practice. They note in particular that contractual arrangements and the use of TPMs may hinder or impair the effective benefit of the exceptions and limitations. This is a matter of concern that should be addressed by legislation and international instruments of harmonization.

Therefore, the LIDC adopted the following sixth resolution at the Rio Congress 2017:

LIDC notes that exceptions and limitations are weakened if they can be overridden by contracts or bypassed by TPMs. Therefore, LIDC recommends that this issue should be expressly addressed by legislation and international instruments of harmonization.